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No. 97-873

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

ALOYZAS BALSYS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a witness may invoke the Fifth Amendment privilege against self-incrimination based solely on a fear of prosecution by a foreign country?

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This *amicus curiae* brief is submitted in support of the position of the Respondent Aloyzas Balsys. Written consents of the parties to the filing of this brief have been contemporaneously submitted to the Clerk of the Court.[1/]

[1/] As required by Rule 37.6 of this Court, *amici curiae* submit the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of almost 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice. The NACDL considers the Fifth Amendment privilege against self-incrimination a critical part of that system.

The NACDL submits this brief because it shares this Court's conviction that the privilege against self-incrimination "registers an important advance in the development of our liberty--'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (quoting E. Griswold, *The Fifth Amendment Today* 7 (1955)). The NACDL is committed to preserving that "landmark" of our liberty.

The New York Council of Defense Lawyers is an organization of more than 170 members of the criminal defense bar in the New York area who practice in the federal courts on a regular basis. It was formed several years ago to address, on an institutional level, issues confronting defense lawyers in criminal cases. In fulfilling that role, the Council has appeared as *amicus curiae* before the United States Court of Appeals for the Second Circuit, as well as state appellate courts and federal

and state trial courts in numerous cases that have posed issues which are important to the criminal defense bar.

SUMMARY OF ARGUMENT

1. The Fifth Amendment self-incrimination clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The constitutional text makes no distinction between domestic and foreign criminal cases. According to its plain terms, the Self-Incrimination Clause bars the government from compelling a person to be a witness against himself in "any criminal case," not merely--as the government would have it--in any *domestic* criminal case.

2. The policies that the privilege promotes confirm that the Self-Incrimination Clause should be interpreted according to its plain language. At its heart, the privilege secures individual liberty. It bars the government from subjecting a witness to the "cruel trilemma" of contempt, perjury, and self-incrimination. *See, e.g., Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990); *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). The government wants to subject Balsys to the very "trilemma" that the Self-Incrimination Clause prohibits. It seeks a court order directing him to answer the government's questions about his wartime activities, on pain of imprisonment for contempt if he remains silent. It reserves the right to prosecute Balsys for perjury if he "forsak[es his] oath" and testifies falsely. And it concedes that truthful responses to the government's questions could subject Balsys to prosecution, conviction, and a possible death sentence in Israel and Lithuania.

3. Contrary to the government's argument, this Court's decisions--culminating in *Murphy v. Waterfront*

Commission--strongly suggest that the Fifth Amendment privilege prohibits the government from compelling a witness to incriminate himself under foreign law. Although the Court's pre-*Murphy* decisions conflict on application of the privilege when the "using" jurisdiction is not subject to the Fifth Amendment, *Murphy* resolved that conflict against the position that the government advocates here. *Murphy* overruled or rejected the reasoning of the decisions on which the government now relies.

4. The Court should decline the government's invitation to restrict the Fifth Amendment privilege because of an alleged impact on domestic law enforcement. This Court has noted that "claims of overriding [governmental] interests are not unusual in Fifth Amendment litigation and they have not fared well." *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973). That claim should fare especially poorly here; barring the government from forcing a witness to incriminate himself under foreign law will have little effect on domestic law enforcement.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE SELF-INCRIMINATION CLAUSE SUPPORTS ITS APPLICATION WHEN THE WITNESS HAS A REAL AND SUBSTANTIAL FEAR OF FOREIGN PROSECUTION.

The Fifth Amendment self-incrimination clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. As this Court has noted, "Where there has been genuine compulsion of testimony, the right has been given broad scope." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). "Genuine compulsion" plainly exists when--as here--testimony is given under court

order backed by the threat of contempt. *See New Jersey v. Portash*, 440 U.S. 450, 459 (1979). Accorded the "broad scope" that *Tucker* contemplates, the constitutional language at issue--"any criminal case"--encompasses both domestic and foreign criminal cases.

The proceedings that Balsys fears in Lithuania and Israel constitute "criminal case[s]" as those words are normally understood. If deported or extradited to one of those countries, Balsys likely would be charged under its penal laws, brought before its courts, and subjected to a trial designed to determine his culpability for alleged past conduct. If found guilty, he would face punishment, including imprisonment and potentially death. Although the line between a "criminal case" and other proceedings might be difficult to draw in some instances under foreign law, just as under domestic law, this case presents no such problem.

The word "any," which precedes the phrase "criminal case," underscores the breadth of the Framers' language. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 117 S. Ct. 1032, 1033 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). By placing the word "any" before the phrase "criminal case," the Framers made clear that the phrase should be given the broadest possible interpretation. Nothing in the constitutional text supports the government's proposed limitation of the Fifth Amendment to compelled testimony that would incriminate the witness in any *domestic* criminal case. *See, e.g., Moses v. Allard*, 779 F. Supp. 857, 874 (E.D. Mich. 1991) ("The language stresses 'any' criminal case; it is not limited to certain criminal proceedings, nor is it limited to domestic criminal cases. It says 'any' criminal case, not 'any domestic criminal case.'").

The government does not analyze the meaning of the words that make up the phrase "any criminal case." It argues instead that "the phrases 'criminal case' in the Fifth Amendment and 'criminal prosecution' in the Sixth Amendment are synonymous." Brief for the United States ("G. Br.") 15. According to the government, because the Court has interpreted the phrase "criminal prosecutions" in the Sixth Amendment to apply only to domestic prosecutions, it should similarly restrict the meaning of the phrase "criminal case" in the Fifth Amendment.

The government's argument fails for several reasons. First, this Court squarely rejected it more than one hundred years ago. The Court found that the phrase "criminal prosecutions" in the Sixth Amendment "distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury," and it declared that "[a] criminal prosecution under article 6 of the amendments, is much narrower than a 'criminal case,' under article 5 of the amendments." *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892). Although the Court has limited broad language in *Counselman* suggesting that transactional immunity is necessary to displace the Fifth Amendment privilege, *see Kastigar v. United States*, 406 U.S. 441, 450-55 (1972), it has never questioned the distinction that case draws between the Fifth and Sixth Amendments.

Second, the language and structure of the Fifth and Sixth Amendments undermine the government's argument. The Framers deliberately chose the broader term--"case"--for the Self-Incrimination Clause, and the narrower term--"prosecutions"--for the Sixth Amendment. The Sixth Amendment deals exclusively with the trial rights of an accused person--that is, a person facing "prosecution." It guarantees the accused a speedy trial, trial by jury, notice of the charges, an

opportunity to confront the witnesses against him at trial, compulsory process to obtain evidence at trial, and the assistance of counsel at critical stages connected with the trial. Almost by definition, the Sixth Amendment protects these trial rights exclusively in domestic prosecutions.

By contrast, the Fifth Amendment guarantees a series of rights--including the right to grand jury indictment, the protection against double jeopardy, the privilege against self-incrimination, the right to due process, and the right not to have property taken without just compensation-- that are not limited to criminal trials or, in some instances, even to criminal cases. These rights limit the power of domestic governments, but their operation is not confined to a discrete setting, such as a criminal courtroom. In particular, the Fifth Amendment privilege against self-incrimination bars domestic governments from compelling a witness to provide incriminating testimony against himself, but neither its language nor the constitutional structure purports to limit the feared incrimination to *domestic* incrimination.

Apart from its misplaced effort to equate the Sixth Amendment phrase "criminal prosecutions" with the Fifth Amendment phrase "criminal case," the government offers no basis to interpret the Self-Incrimination Clause contrary to its plain meaning. It acknowledges that "[t]here is no surviving record that, in drafting the Fifth Amendment, the Framers expressly discussed whether the phrase 'any criminal case' in the Self-Incrimination Clause was intended to apply only to domestic, and not foreign, prosecutions." G. Br. 16. The government concludes from this dearth of legislative history that "[t]here is nothing to indicate that the Framers had foreign criminal prosecutions in mind." G. Br. 16. Perhaps not. But the language the Framers chose--"any criminal case"--plainly encompasses foreign as well as domestic criminal cases, and nothing in the history surrounding the adoption and ratification

of the Self-Incrimination Clause provides any reason to limit its plain meaning.

If anything, the historical context of the Fifth Amendment supports its application to bar the government from compelling a witness to incriminate himself under foreign law. As one court observed, when the Amendment was adopted, "[t]his new nation had just fought a war to be free from domination of the American people by a foreign sovereign. It is difficult to credit that, given this context, the founders of this new government would have countenanced the compulsion of an American's testimony so that it could be turned over to an English king's prosecutor for prosecution of that American in England." *Moses*, 779 F. Supp. at 874 n.25.

The government asserts that the Framers were not "operating against any settled understanding of the privilege against self-incrimination as it had developed in the common law of England and the American colonies." G. Br. 16. But two pre-Constitutional English decisions support application of the privilege to bar compelled self-incrimination under foreign law. In *East India Co. v. Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (1749), the English court upheld a claim of privilege based on the defendant's fear of prosecution in India. *See id.* at 247, 27 Eng. Rep. at 1011, *quoted in Murphy*, 378 U.S. at 58. And in *Brownsword v. Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (1750), the Court of Chancery upheld a claim of privilege on the ground that a response, although not incriminating under common law, would render the defendant "liable to prosecution in ecclesiastical court." *Id.* at 244-45, 28 Eng. Rep. at 157-58, *quoted in Murphy*, 378 U.S. at 58-59.

The government argues that *Campbell* and *Brownsword* "involved two judicial systems operating under the same sovereign." G. Br. 17. But "[a] review of the English court

opinions . . . strongly suggests that these courts viewed the ecclesiastical courts and the courts of India as distinct and independent entities." *United States v. Gecas*, 120 F.3d 1419, 1469 (11th Cir. 1997) (Birch, J., dissenting); *see Moses*, 779 F. Supp. at 876; *cf.* J.A.C. Grant, *Federalism and Self-Incrimination*, 5 UCLA L. Rev. 1, 7-8 & n.178 (1958) (noting that "English courts have considered colonial tribunals to be *foreign*, and Indian native state courts were considered *foreign* even to those of British India") (emphasis in original; footnotes omitted). In any event, nothing in the pre-Constitutional interpretation of the privilege against self-incrimination supports the government's effort to restrict the plain language of the Fifth Amendment. That language--"any criminal case"--encompasses both domestic and foreign criminal cases.

II. THE POLICIES UNDERLYING THE SELF-INCRIMINATION CLAUSE SUPPORT ITS APPLICATION WHEN THE WITNESS HAS A REAL AND SUBSTANTIAL FEAR OF FOREIGN PROSECUTION.

The plain language of the Self-Incrimination Clause makes clear that the privilege bars the government from forcing a witness to incriminate himself under foreign law. The same result follows from the analysis that this Court adopted in *Murphy*. In that case, involving application of the privilege between the state and federal governments, the Court considered "whether such an application of the privilege promotes or defeats its policies and purposes." 378 U.S. at 54. Here, as in *Murphy*, application of the privilege to prevent the government from forcing a witness to provide testimony that could lead to his conviction and punishment abroad promotes the "policies and purposes" of the Fifth Amendment.

This Court has identified several policies that underlie the privilege against self-incrimination:

> [The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load . . . ; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Id. at 55; *see, e.g., Pennsylvania v. Muniz*, 496 U.S. 582, 595 n.8 (1990); *Doe v. United States*, 487 U.S. 201, 212-13 (1988).

These policies fall into two general categories: the privilege "secur[es] individual liberties," and it "constrain[s] the government from overzealous prosecution of individuals." *Gecas*, 120 F.3d at 1460 (Birch, J., dissenting); *cf. United States v. Balsys*, 119 F.3d 122, 129 (2d Cir. 1997) (the privilege "advances individual integrity and privacy, it protects against the state's pursuit of its goals by excessive means, and it promotes

the systemic values of our method of criminal justice"). These policies are closely related; protecting individual liberty necessarily restrains the government, and restraining the government in its dealings with its citizens often advances individual liberty. *See* Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context* 113-17 (forthcoming in 45 UCLA L. Rev.).[2/]

The first of these policies--securing individual liberty--forms the heart of the Fifth Amendment's protections. "By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch v. United States*, 409 U.S. 322, 327 (1973). This emphasis on the individual manifests itself in the courts' refusal to let the government force a witness to choose between disobeying a court order to testify, giving false testimony, or incriminating himself. "At its core, the [Fifth Amendment] privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury." *Muniz*, 496 U.S. at 596 (quotation omitted).

Applying the Fifth Amendment privilege to bar the United States government from compelling a witness to incriminate himself under foreign law advances this "core"

[2/] We understand that the parties and each Member of the Court have been furnished with copies of Professor Amann's manuscript.

policy. This case illustrates the point. If the government prevails, Balsys will confront the "cruel trilemma" that the privilege proscribes. The district court has ordered him to answer the government's questions about his wartime activities, on pain of imprisonment for contempt if he remains silent. *See United States v. Balsys*, 918 F. Supp. 588, 600 (E.D.N.Y. 1996). The government reserves the right to prosecute Balsys for perjury if he "forsak[es his] oath" and testifies falsely. And it is undisputed in this Court that truthful responses to the government's questions could subject Balsys to prosecution, conviction, and a possible death sentence in Israel and Lithuania. *See id.* at 592-97 (finding that Balsys has a "real and substantial fear" of prosecution).

Since the landmark decision in *Murphy*, this Court has never interpreted the Fifth Amendment to permit the United States to confront a witness with the "cruel trilemma" that the government seeks to impose on Balsys. Indeed, the Court has repeatedly invoked the "cruel trilemma" standard to test claims of the Fifth Amendment privilege. *See, e.g., Muniz*, 496 U.S. at 596-97; *Doe*, 487 U.S. at 212-14; *South Dakota v. Neville*, 459 U.S. 553, 561-64 (1983); *Tucker*, 417 U.S. at 444-45. The Court should not retreat from that standard here.

The government largely ignores the Fifth Amendment concern with individual dignity and privacy. It never mentions the "cruel trilemma" standard. It merely notes that "'the privilege has never been given the full scope which the values it helps to protect suggest.'" G. Br. 29 (quoting *Schmerber v. California*, 384 U.S. 757, 762 (1966)). But the Court has made that observation when witnesses have attempted to stretch the Self-Incrimination Clause beyond its plain language to include compelled *non-testimonial* incrimination. *See Doe*, 487 U.S. at 213 & n.11 (rejecting application of Fifth Amendment to bank consent form); *Schmerber*, 384 U.S. at 762 (rejecting

application of Fifth Amendment to compelled blood sample). Here, however, the plain language of the Fifth Amendment squarely supports application of the privilege to compelled testimony that incriminates the witness under foreign law. *See supra* Part I. The policies that underlie the privilege simply confirm that the language means what it says.

The government focuses almost exclusively on the policy of preventing official overreaching, and it insists that the privilege should not be recognized here because no such risk exists when the compelled testimony will be used in a foreign prosecution. G. Br. 26-30. This Court rejected the identical argument in *Murphy*. Responding to the state's contention that applying the privilege between the state and federal governments would not serve the policy of preventing government overreaching, the Court declared that "[i]t will not do . . . to assign one isolated policy to the privilege, and then to argue that since 'the' policy may not be furthered measurably by applying the privilege across state-federal lines, it follows that the privilege should not be so applied." *Murphy*, 378 U.S. at 56 n.5. Similarly here, "[i]t will not do" for the government to argue that the privilege serves only to prevent overreaching and then to contend that that policy "may not be furthered measurably" by applying the privilege to bar compelled self-incrimination under foreign law.[2]

The government's argument fails even on its own terms. It asserts that "'[w]here the crime is a foreign crime, any motive

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[2] *See* Recent Case: Criminal Law and Procedure, *Criminal Procedure--Fifth Amendment--Eleventh Circuit Holds That the Privilege Against Self-Incrimination Does Not Apply to the Possibility of Foreign Prosecution.*--United States v. Gecas, 111 Harv. L. Rev. 1128, 1132-33 (1998) [hereinafter "Recent Case"].

to inflict brutality upon a person because of the incriminating nature of the disclosure--any "conviction hunger" as such--is absent.'" G. Br. 28 (quoting 8 John H. Wigmore, *Evidence* § 2258, at 345 (McNaughton rev. ed. 1961)). But this argument ignores the reality of modern law enforcement. Crime is increasingly international in scope. Extradition treaties, mutual legal assistance treaties, and other, less formal modes of intergovernmental law enforcement cooperation proliferate. *See, e.g.*, *Balsys*, 119 F.3d at 130-31; Amann, *supra*, at 84-93. As the courts below found, the Office of Special Investigations within the Department of Justice--the federal entity pursuing the case against Balsys--was created "for the sole purpose of investigating and gathering evidence of alleged Nazi collaborators residing in the United States illegally, and taking legal action to denaturalize, deport or prosecute them"; it "has entered into an agreement to provide evidence that it has gathered on suspected Nazi collaborators to Lithuania"; and it has "exchanged incriminating evidence on suspected Nazi collaborators with Israel on past occasions." *Balsys*, 119 F.3d at 131; *see Gecas*, 120 F.3d at 1426; *Balsys*, 918 F. Supp. at 595-96. The OSI and other federal agencies engaged in the "often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), have a powerful interest in the outcome of foreign prosecutions in which they play a key investigative role. Not only do those agencies want to see their own work bear fruit; they also hope to obtain reciprocal assistance from foreign authorities. The "cooperative federalism" of the 1960s, *Murphy*, 378 U.S. at 55-56, has become the "cooperative internationalism" of the 1990s, *Balsys*, 119 F.3d at 130-31.

The court of appeals recognized that "danger [of abuse] exists where the fear is of prosecution in foreign lands," because of the federal government's "significant stake in many foreign criminal cases." *Balsys*, 119 F.3d at 130-31. Addressing this

point, the government insists that "[t]he court's rationale proves too much," because "[i]t would apply even more strongly when the United States seeks self-incriminating testimony from a witness, under a grant of immunity, so that the United States itself may prosecute the witness's more culpable conspirators." G. Br. 28. This argument contains a basic flaw. Testimony given "under a grant of immunity" by definition cannot be "self-incriminating" under domestic law. *See Kastigar*, 406 U.S. at 453. Thus, whatever incentive the government might have to abuse an immunized witness to obtain incriminating testimony against the witness' co-conspirators, that abuse does not implicate the privilege against self-incrimination (unless, of course, the witness has a real and substantial fear of foreign prosecution). On the other hand, government overreaching designed to force a person to incriminate himself under foreign law *does* implicate the privilege, because it compels him to become a witness against himself in a criminal case and confronts him with the "cruel trilemma" that the privilege prohibits.

III. THIS COURT'S PREVIOUS DECISIONS SUPPORT APPLICATION OF THE PRIVILEGE WHEN THE WITNESS HAS A REAL AND SUBSTANTIAL FEAR OF FOREIGN PROSECUTION.

This Court's previous decisions, culminating in *Murphy*, support application of the privilege against self-incrimination when the witness has a real and substantial fear of foreign prosecution.

Before *Murphy*, two lines of cases from this Court addressed application of the privilege against self-incrimination when the witness feared prosecution in a jurisdiction that was not bound by the Fifth Amendment. The cases concerned

efforts by the federal government to compel witnesses to incriminate themselves under state law before this Court had applied the Fifth Amendment to the states. In one line of cases, the Court held that the privilege prohibited a federal court from compelling a witness to disclose information that could incriminate him under state law. *See Ballmann v. Fagin*, 200 U.S. 186, 195-96 (1906); *United States v. Saline Bank*, 26 U.S. (1 Pet.) 100, 104 (1828). In the other line of cases, the Court limited the privilege to testimony that could incriminate the witness in the same jurisdiction that was compelling the testimony. *See United States v. Murdock*, 284 U.S. 141, 149 (1931); *Hale v. Henkel*, 201 U.S. 43, 68-69 (1906) (dictum); *cf. Feldman v. United States*, 322 U.S. 487, 490-94 (1944) (Fifth Amendment does not bar admission in federal court of testimony given in state court). Until *Murphy*, these two lines of cases stood in tension with each other. *See, e.g., United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103, 113 (1927); Amann, *supra*, at 8-18.

The Court resolved this tension in *Murphy*. It dismissed the dictum in *Hale* as "not well founded," squarely rejected the reasoning of *Murdock*, and embraced the holdings of *Saline Bank* and *Ballmann*. *See* 378 U.S. at 59-78. After examining English decisions, the Court found that the privilege against self-incrimination in that country "protect[ed] witnesses against disclosing offenses in violation of the laws of another country." *Id.* at 72 (citing *United States v. McRae*, 3 Ch. App. 79 (1867)).[4/] The *Murphy* Court concluded:

[4/] The government suggests that this Court erred in *Murphy* when it found that *McRae* stated the "settled" English rule. It contends that the English rule actually was less settled than the Court believed it to be. G. Br. 23-26. There is ample support for the conclusion reached in *Murphy*. *See, e.g.*, J.A.C. Grant, *Federalism and Self-Incrimination*, 5 UCLA L. Rev. 1, 6 (1958)

> In light of the history, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts . . . and by Chief Justice Marshall and Justice Holmes. See *United States v. Saline Bank of Virginia, supra*; *Ballmann v. Fagin, supra*. We reject--as unsupported by history or policy--the deviation from that construction only recently adopted by this Court in *United States v. Murdock, supra*, and *Feldman v. United States, supra*. We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.

Id. at 77-78.

Murphy does not resolve the precise question presented here; the holding in that case addressed application of the privilege against self-incrimination when both the compelling and using jurisdictions are subject to the Fifth Amendment. But *Murphy*'s reasoning--particularly its embrace of *Saline Bank*, *Ballmann*, and the English rule as stated in *McRae*--strongly supports application of the privilege to bar the United States government from compelling a witness to incriminate himself under foreign law. *McRae* expressly held that the privilege applies when the witness fears foreign prosecution, *see* 3 Ch.

(concluding that "the *McRae* case seems to have settled the matter"). The important point is that *Murphy* "accept[ed] as correct" the principle stated in *McRae*, as well as in *Saline Bank* and *Ballmann*. 378 U.S. at 77-78; *see Gecas*, 120 F.3d at 1469-70 (Birch, J., dissenting); *Balsys*, 119 F.3d at 133 n.8.

App. at 87, and *Saline Bank* and *Ballmann* applied the privilege under closely analogous circumstances--that is, where the Fifth Amendment bound the compelling jurisdiction but not the potential using jurisdiction.[5/] As Chief Justice Burger observed, *Murphy* "contains dictum which, carried to its logical conclusion, would support" application of the privilege when the witness fears foreign prosecution. *Araneta v. United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers).

To distinguish *Murphy*, the government relies heavily on a footnote in *Kastigar* asserting that the ruling in *Murphy* "'was made necessary by the decision in *Malloy v. Hogan,* [378 U.S. 1 (1964)], in which the Court held the Fifth Amendment privilege applicable to the States through the Fourteenth Amendment.'" G. Br. 21 (quoting *Kastigar*, 406 U.S. at 456 n.42). The government infers from this statement that, under *Murphy*, a witness may assert the privilege only when both the compelling jurisdiction and the potential using jurisdiction are subject to the Fifth Amendment. Here, of course, that is not the case; the Fifth Amendment binds the compelling jurisdiction--the United States--but it does not bind Lithuania and Israel.

The government's inference from the *Kastigar* footnote is unwarranted. *Murphy* involved an effort by a *state* to compel testimony over the witness' assertion of the Fifth Amendment privilege. For the privilege to prevent such compulsion, the compelling jurisdiction must be subject to the Fifth Amendment. *See, e.g., Jack v. Kansas*, 199 U.S. 372, 379-80 (1905). Before *Malloy*, the Fifth Amendment did not bind the states. *See Twining v. New Jersey*, 211 U.S. 78 (1908). *Malloy* overruled

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[5/] In both *Saline Bank* and *Ballmann*, the potential using jurisdiction was a state. At the time those cases were decided, this Court had not yet applied the Fifth Amendment to the states.

Twining and held for the first time that the Fifth Amendment applies to the states through the Fourteenth Amendment. Only after *Malloy* were the compelling jurisdictions in *Murphy*--the States of New York and New Jersey--subject to the Fifth Amendment. In that sense only, the decision in *Malloy* necessitated the decision in *Murphy*.

This relation between *Malloy* and *Murphy* does not mean--as the government would have it--that a witness cannot assert the privilege against self-incrimination unless both the compelling jurisdiction and the potential using jurisdiction are subject to the Fifth Amendment. By its discussion of English law and its approval of *Saline Bank* and *Ballmann*, *Murphy* made clear that a witness may assert the privilege against a compelling jurisdiction that is subject to the Fifth Amendment even if the potential using jurisdiction is not subject to the constitutional limitation.

To buttress its reading of *Murphy*, the government cites *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). G. Br. 22. *Verdugo-Urquidez* is a Fourth Amendment case. In brief dictum, unaccompanied by analysis, this Court asserted that the privilege against self-incrimination "is a fundamental trial right of criminal defendants" and added that "[a]lthough conduct by law enforcement officers prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Id.* at 264. Drawing on this language, the government claims that "[e]ven if the compelled testimony is later used against the witness in a foreign prosecution, a constitutional violation cannot occur when the 'using' sovereign is an independent foreign government." G. Br. 28.

The *Verdugo-Urquidez* dictum on which the government relies is not well founded. This Court has repeatedly held that the Fifth Amendment prohibits the *compulsion*--and not merely

the *use*--of potentially incriminating testimony. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 256-57 (1983); *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-06 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 77-78 (1973); *Counselman*, 142 U.S. at 562; *United States v. Burr*, 25 F. Cas. 38 (C.C.D.Va. 1807) (Marshall, Circuit Justice) (No. 14692e).[6/] Indeed, the Court has recognized that "the touchstone of the Fifth Amendment is compulsion." *Cunningham*, 431 U.S. at 806. For the Court to elevate the *Verdugo-Urquidez* dictum to a holding, it would have to overrule more than a century of previous decisions and dramatically reinterpret the Self-Incrimination Clause.[7/]

Kastigar--which *Verdugo-Urquidez* cites in the course of its dictum--does not support the proposition that the Self-Incrimination Clause prohibits only use, and not compulsion, of

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[6/] Of course, if the government compels incriminating testimony in violation of the privilege, the Fifth Amendment also prohibits jurisdictions bound by the privilege from using the incriminating testimony against the witness in a criminal case. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

[7/] Such a reinterpretation of the Fifth Amendment would have potentially far-reaching consequences. For example, courts have generally held that a criminal defendant cannot obtain the testimony of a witness who asserts his privilege against self-incrimination. *See, e.g., United States v. Carr*, 67 F.3d 171, 176 (8th Cir. 1995), *cert. denied*, 516 U.S. 1182 (1996); *Gleason v. Welborn*, 42 F.3d 1107, 1109 (7th Cir. 1994); *United States v. Thornton*, 733 F.2d 121, 125 (D.C. Cir. 1984). But the defendant seeks only to compel the testimony, not to use it against the witness in a criminal case. Under the *Verdugo-Urquidez* dictum, therefore, the defendant's Sixth Amendment right to compulsory process should overcome the witness' refusal to testify.

self-incriminating testimony. *Kastigar* declares that the "sole concern" of the privilege "is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts." 406 U.S. at 453 (quotations omitted; ellipsis in original). As Judge Birch recently explained:

> The focus of Kastigar, as is that of the Fifth Amendment, is on the act of compelling testimony: A domestic court is absolutely prohibited from engaging in such an act if the testimony could lead to a criminal conviction; that is, Kastigar recasts in the context of the immunity statute the requirement that the fear of prosecution must be reasonable to justify the invocation of the privilege against self-incrimination. The granting of use and derivative use immunity removes the danger of conviction on the basis of the compelled testimony and, thus, removes the necessary precondition (i.e., fear of use or derivative use of compelled testimony in a criminal prosecution) to a proper invocation of the privilege; at least it does so in the usual case involving a potential domestic prosecution.

Gecas, 120 F.3d at 1462 (Birch, J., dissenting). Thus, *Kastigar* is entirely consistent with this Court's cases holding that the Fifth Amendment prohibits the government from compelling a witness to give potentially self-incriminating testimony.

This Court's decisions in *Saline Bank*, *Ballmann*, and *Murphy* strongly support what the language and the policies of the Self-Incrimination Clause mandate: that the United States government cannot compel a witness to incriminate himself in

"any criminal case," domestic or foreign. Nothing in *Kastigar* is to the contrary.

IV. THE COURT SHOULD NOT RESTRICT THE FIFTH AMENDMENT PRIVILEGE BECAUSE OF ITS ASSERTED IMPACT ON DOMESTIC LAW ENFORCEMENT.

Without citing a single instance in which an assertion of the privilege against self-incrimination based on fear of foreign prosecution has actually impeded law enforcement, the government asks the Court to restrict the privilege on that basis. G. Br. 30-36. The Court should decline the government's invitation, as it has done repeatedly in the past. The alleged impact on law enforcement from applying the privilege to foreign incrimination is both minimal and constitutionally irrelevant.

Almost seventy-five years ago, the Court rejected the government's argument that permitting a debtor to assert the Fifth Amendment privilege during a bankruptcy examination would undermine the bankruptcy system. *McCarthy v. Arndstein*, 266 U.S. 34 (1924). The Court similarly rejected the argument that extending the privilege to those undergoing custodial interrogation--and requiring certain warnings to protect the right to remain silent--would cripple law enforcement. *Miranda v. Arizona*, 384 U.S. 436 (1966). In 1973, faced with another contention that application of the privilege would damage a key government function, the Court observed that "claims of overriding [governmental] interests are not unusual in Fifth Amendment litigation and they have not fared well." *Turley*, 414 U.S. at 78. The Court underscored the point in *Cunningham*: "We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need." 431 U.S. at 808 (citing *Turley*).

Cunningham and the cases preceding it make clear that, unlike some constitutional rights, the Fifth Amendment privilege cannot be balanced against competing government interests. *See Portash*, 440 U.S. at 459. The Framers struck the appropriate balance when they crafted the constitutional text. The privilege applies, according to its language and purposes, regardless of its impact on law enforcement or other government interests. *See, e.g., Moses v. Allard*, 779 F. Supp. 857, 882 (E.D. Mich. 1991); *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972).

For several additional reasons, the government's "impact on law enforcement" argument carries little weight. First, claims of the Fifth Amendment privilege based on self-incrimination under foreign law are rarely upheld. To sustain the privilege, the witness must demonstrate a "real" and "substantial" fear of foreign prosecution. *See Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478-81 (1972). Witnesses have satisfied this burden in only a handful of reported cases stretching back more than twenty-five years; far more often than not, courts have found that the witness has failed to meet his burden. *See, e.g., id.*; *Gecas*, 120 F.3d at 1426 (citing cases); *Balsys*, 119 F.3d at 127, 135 (citing cases).[8/]

[8/] *See also* Recent Case, *supra* note 3, at 1132 ("[T]he threshold requirement of a 'real and substantial' fear of foreign conviction provides a meaningful limitation on the Fifth Amendment privilege, thereby preventing serious impairment of domestic law enforcement."). The government asserts that the "real and substantial fear" standard is not "workable" because of an alleged difficulty in ascertaining foreign law. G. Br. 36. But the government cites no case in which a court has actually encountered any such difficulty, and it does not contend that the lower courts in this case did so. In any event, because the witness bears the burden of establishing a real and substantial

Because such claims are rarely upheld, their impact on law enforcement has been and will remain minimal.

Second, witnesses with a real and substantial fear of foreign prosecution who are compelled to endure the "cruel trilemma" of perjury, contempt, and self-incrimination are unlikely to choose self-incrimination--the only choice that will aid law enforcement. This case provides an excellent example. Assume, hypothetically, that truthful testimony by Balsys about his wartime activities would incriminate him under Lithuanian or Israeli law. Faced with a choice between relatively brief incarceration in a United States prison for contempt if he remains silent, possible prosecution and incarceration (again in a United States prison) for perjury if he testifies falsely, and deportation, prosecution for war crimes, and possible execution if he testifies truthfully, it seems extremely doubtful that he--or anyone else in his position--would choose the last alternative.

Third, *civil* law enforcement will suffer little, if at all, from permitting witnesses to assert the Fifth Amendment privilege based on fear of foreign prosecution. That is so because, in civil cases, an adverse inference may be drawn from the witness' invocation of the privilege. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

The government does not offer a single example--not even a hypothetical one--to illustrate the effect on law enforcement that it claims will follow from an adverse ruling in this case. In *Gecas*, however, the plurality attempted to devise such an example:

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fear of foreign prosecution, any significant uncertainty in foreign law will redound to his detriment and to the government's benefit.

> Assume . . . that the sale and distribution of cocaine is illegal in the nation of Ames. A citizen of Ames visits the United States on a temporary visa. She is arrested in Miami International Airport after police find five kilograms of cocaine in her luggage. The prosecution offers her immunity in exchange for testimony about three leaders of a drug ring operating in Southern Florida. Under the rule proposed by Gecas, she can still refuse to testify because Ames may prosecute her for the same conduct.

120 F.3d at 1434.

This hypothetical underscores the weakness of the "impact on law enforcement" argument. To find any possibility of such an impact from these facts, one must assume that the Ames citizen (1) could establish a real and substantial fear of prosecution if deported to Ames, and (2) would provide truthful testimony against the Florida drug dealers (rather than go into contempt or perjure herself) if denied the privilege based on fear of foreign prosecution. Neither assumption can readily be made.

Of equal significance, the Eleventh Circuit's hypothetical ignores what actually would happen in such a case. Even if the Ames citizen established a real and substantial fear of prosecution and a court upheld her claim of privilege, the government could still obtain her cooperation. The federal prosecutor handling the matter would prepare to indict her for possession of the five kilograms of cocaine with intent to distribute. Her counsel would explain her choices: she could permit herself to be indicted and face almost certain conviction and a lengthy prison sentence, or she could cooperate with the government against the Florida drug dealers, avoid prison time

in the United States, and take her chances with prosecution in Ames. Given this choice, most defendants would agree to cooperate. If possible prosecution in Ames remained too great a disincentive, the defense attorney could attempt to negotiate an agreement with the government under which the defendant would be permitted to remain in the United States when her cooperation was complete. Whether the government would enter into such an agreement would depend on how valuable it considered her testimony. Through this process of negotiation, backed by the threat of domestic prosecution, the government likely would obtain the assistance it needed.

The government's claim that recognition of the privilege against self-incrimination in this case would damage domestic law enforcement is both exaggerated and, under *Cunningham* and *Turley*, irrelevant. The Court should interpret the Self-Incrimination Clause, in light of its language and policies, to prohibit the federal government from compelling a witness to incriminate himself under foreign law. The Court should not force Aloyzas Balsys to face the "cruel trilemma" that the Fifth Amendment proscribes.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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